

**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER: 93-0445 CS**

**Controlled Substance Excise Tax  
For Tax Year 1993**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUES**

**I. Controlled Substance Excise Tax - Imposition**

**Authority:** IC 6-7-3-5; IC 6-8.1-5-1; Bryant v. State of Indiana, 660 N.E.2d 290 (Ind. 1995); Cliff v. Indiana Department of State Revenue, 660 N.E.2d 310 (Ind. 1995)

Taxpayer protests the imposition of the controlled substance excise tax.

**STATEMENT OF FACTS**

Taxpayer was arrested, in Monroe County, Indiana in May 5, 1993 for possession of marijuana. The Department prepared and mailed to taxpayer a controlled substance excise tax assessment, with base deficiency of \$494,668.00, on May 6, 1993. Taxpayer protested this assessment. Additional relevant facts will be provided below, as necessary.

**I. Controlled Substance Excise Tax - Imposition**

**DISCUSSION**

The Department assessed the controlled substance excise tax pursuant to IC 6-7-3-5 which states in part:

The controlled substance excise tax is imposed on controlled substances that are:

- (1) delivered;
- (2) possessed; or

(3) manufactured;  
in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852

The taxpayer has three main legal arguments against the Controlled Substance Excise assessment: (1) The assessment is unconstitutional as an excessive fine and penalty; the punishment is also disproportionate with the nature of the offense in violation of Art. 1 § 11 of the Indiana Constitution and the Eighth amendment of the United States constitution; (2) Art. 1 § 11 of the Indiana Constitution and Fourth amendment of the United States Constitution of prohibit unreasonable searches and seizures and that this prohibition applies to tax assessment cases such as this; and (3) The taxpayer is being criminally prosecuted and that the assessment and criminal prosecution violate the double jeopardy clauses of both the Indiana and United States Constitutions.

(1) The taxpayer alleges that the assessment of the tax and penalty against him is excessive and disproportionate. In Bryant v. State of Indiana, 660 N.E.2d 290 (Ind. 1995), the Court stated that the CSET was a penalty. However, as the taxpayer notes, neither the Indiana nor the United States Supreme Court has addressed the disproportionality of the tax and penalty. The Bryant court did note that the tax (at time of imposition) was ninety times of the value of the marijuana but did not make a ruling under Art. 1 Section 16 as to whether the CSET was an excessive fine. The Department does not rule on issues beyond its purview, and as an administrative agency the Department is in no position to rule on the United States Constitution or the Indiana Constitution.

(2) The taxpayer also contends that his search and seizure rights were violated. The taxpayer states that even though he gave consent to search his trunk, the marijuana found was a result of an unconstitutional search and seizure. This criminal question has not been reviewed as the taxpayer's criminal case has not yet been resolved. The Department only looks to the question of whether the taxpayer was in possession of the marijuana without remitting the tax.

(3) The Indiana Supreme Court ruled in Bryant, that the Controlled Substance Excise Tax is a jeopardy and the imposition of the civil and criminal penalties constituted multiple punishment for the same offense. The separate proceedings violate the double jeopardy prohibition against a second prosecution for the same offense. The United States Supreme Court uses this test to separate out whether one offense or two occurred—whether each provision requires a proof of a fact that the other does not. The Indiana Supreme Court found that the CSET and the criminal offense are punishments for the same offense since the same elements are involved.

As Bryant indicates, a jeopardy attaches where there is a determination of guilt, so jeopardy will attached when a jury has been impaneled and sworn or when the Department of Revenue serves the party with a Jeopardy Findings and Assessment and Demand. In the case at hand, the Department mailed its Jeopardy Findings on May 6, 1993. This jeopardy assessment was mailed the day after the taxpayer's arrest, so it predates any possible criminal jeopardy attachment. Thus, the Department's jeopardy is first in time and

is valid over the criminal jeopardy.

As taxpayer was found in possession of marijuana, the Department assessed the tax, and pursuant to IC 6-8.1-5-1(b), "the notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Given that the Department's jeopardy attached first, and the taxpayer has not overcome the *prima facie* burden of disproving the possession of marijuana, the protest is denied.

### **FINDING**

The taxpayer's protest is denied.